A. Growth of the Teleservices Marketplace

Since the adoption of the TCPA, the U.S. has seen significant growth in the teleservices marketplace that parallels the growth of communications industries generally. This growth is due, in part, to the advent of the predictive dialer, a device that uses complex algorithms to dial telephone numbers from a list provided by the user and to match the number of live voices reached with the number of sales agents available to take calls. Predictive dialers not only increase the efficiency of call centers by maximizing the amount of time a sales agent speaks to consumers, they have improved telemarketers' ability to comply with existing state and federal regulations.

Another factor contributing to the growth in the teleservices industry is the number of small businesses attempting to break into the marketplace over the past ten years. 34/ Because a telephone marketing campaign is one of the most cost-effective methods of new business generation, many small businesses rely on telemarketing to compete with larger companies. See Rathbone Aff. ¶ 4, Ex. 3. Indeed, the FCC's sister agency, the SBA, advises that "telemarketing may be an effective method" for small businesses to "contact potential customers or sell products or services." Small Business Administration, Marketing Strategies *for the* Growing Business, 5-6 (1991). 35/

34/ Small Business Administration, Opportunities for Success: SBA Fiscal Year 1999 Annual Performance Report at 10 ("There are now more 25 million small businesses in the United States, 5 million more than in 1990 and the largest number of small businesses ever."). This twenty-five percent increase is consistent with steady growth between 1982 and 1999. *Id.*

35/ This advice has been put into action by ATA members. For example, Personal Legal Plans, which uses telemarketing to offer the "one-stop-shopping'' for prepaid

This growth of teleservices alone, however, is not a reason to adopt new rules as proposed by the FCC, for the Commission cannot simply assume that growth in telemarketing services equates to an increase in telemarketing abuses. Such action would run counter to the Commission's recognition, when it adopted rules implementing the TCPA in 1992, that the growth in telemarketing sales, the number of businesses involved, and the resulting job creation support the statutory need to "preserve legitimate business practices." TCPA Report & Order, 7 FCC Rcd at 8754 & n.1 (quoting statement by President Bush). See also Unsolicited Telephone Calls, 77 F.C.C.2d at 1031 (extent of telemarketing sales is evidence of public acceptance of the practice). The growth in teleservices did not occur in a vacuum but instead tracked the growth in the U.S. population and the economy as a whole. Between 1990 and 2000, the U.S. population grew by roughly 25 million persons or 10 percent, while and the economy expanded by nearly $416 billion or 71.7 percent. 36/ During this period (1990-1999), the number of residential phones grew by 35.6 million or nearly 40 percent. 37/

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legal, tax, and financial services, experimented initially with traditional advertising to generate demand, but found that such "passive" media proved ineffective. McGarry Aff. ¶ 6, Ex. 7. It found that such advertising failed to overcome consumers' disinclination to face the serious issues involved in legal, tax and financial matters, and that those media were incapable of directly targeting the narrow segment Prepaid Legal Plans serves. Id. The company found that telemarketing campaigns could be better designed to reach only its most likely potential customers, and that two-way telephone conversations allowed the necessary exchange of ideas that motivated consumers. Id.

36/ U.S. Department of Commerce, Statistical Abstract of the United States, pp. 8, 417 (2001).

37/ Federal Communications Commission, Trends in Telephone Service, p. 8-6, Table 8-4 (August 2001).

The growth in teleservices is part of the shift in consumer shopping patterns toward transactions that may be conducted from the home. Such transactions include catalogue purchases, use of home shopping channels on television, responses to telemarketing calls, shopping by computer, pay-per-view video, and on-line or telephone banking. Because the official policy of the U.S. government – including that of the FCC – encourages commerce conducted by such means, the Commission cannot reasonably justify greater restrictions simply because the teleservices sector has grown. Logic, backed by the TCPAs mandate, suggests that the FCC must tailor its rules to focus only on abusive practices

In this regard, federal policies promoting telecommunications competition and seeking to enable consumers to choose their service providers offer a useful analogy. 38/ One byproduct of this salutary policy is the possibility of abuse, where competitors may become overzealous in acquiring new customers or promoting new services, and engage in practices known as "cramming" and "slamming." 39/ It is noteworthy that the number of complaints the Commission receives about such practices far outstrips the number of TCPA-related complaints that are submitted. In the Bureau's most recent quarterly report, for example, the number of cramming and slamming complaints exceeded the combined total of all TCPA complaints by nearly 40

38/ See, *e.g.*, Billed *Party* Preference for *InterLATA 0+* Calls, 16 FCC Rcd 22314, 22333, App. C, ¶ 3 (among "principal goals of the telephony provisions of the 1996 Act is promoting increased competition in all telecommunications markets, including those that are already open to competition, particularly long-distance").

39/ "Cramming" is the practice of placing unauthorized, misleading, or deceptive charges on a subscriber's telephone bill. "Slamming" is the illegal practice of changing a subscriber's telecommunications service without permission.

percent. 40/ In response to the complaints about cramming and slamming, the Commission has taken significant enforcement actions. 41/ But the need to enforce the law against such abusive practices is not a reason to discontinue the promotion of competition among telephone carriers. 42/ Instead, abuses by some carriers call for better enforcement of the FCC's existing rules against transgressors. Similarly, the existence of some abusive telemarketing practices calls for policies that address the specific abuses and for better enforcement of the TCPA. It does not warrant increased restrictions on legitimate telemarketing activities.

This point is particularly important in that most telemarketers are small businesses. Notably, President Bush recently directed all federal agencies, including the FCC, to seriously consider the consequences to small businesses before taking

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40/ For the second quarter of 2002, the Commission received 1,928 cramming and slamming complaints, compared to 1,385 TCPA-related complaints. Quarterly Report on Informal Consumer Inquiries and Complaints (Oct. 15, 2002). During the same period, the Commission received more than six times the number of consumer inquiries for cramming and slamming than it did for all categories of TCPA inquiries. Id. (45,333 inquiries for cramming and slamming; 6,994 inquiries for all TCPA categories).

41/ See, *e.g.*, Federal Communications Commission Announces Year 2000 Common Carrier-Related Enforcement Action Totals, News Release (Dec. 21, 2000) (summarizing year-to-date 2000 common carrier enforcement actions, including nearly $14 million in slamming penalties); see *also* http://www.fcc.gov/eb/tcd/slam.html (visited Nov. 15,2002).

42/ Similarly, as noted infra, over 70 percent of the "do-not-call" complaints the FCC receives involve calls from telephone carriers promoting competitive service. See *infra* note 93 and accompanying text. This suggests that adoption of a national do-not-call database would reduce the ability of telephone companies to make unsolicited calls, and thereby undermine the policy goal of telecommunications competition.

any regulatory action. 43/ There can be no doubt that any significant change in the FCC's telemarketing rules could have a devastating impact on this sector of the economy. See generally Bottom Aff., Ex. 8; Brubaker Aff. ¶ 16, Ex. 4.

B. Experience Under the Existing Regulations Reveals that New Rules Are Unnecessary

1. There is No Record of Noncompliance With Existing Rules

The FCC's experience with the TCPA does not support the proposal for a significant change in the rules. Tellingly, in the ten years since adoption of company-specific do-not-call rules and other protections in the TCPA Report and Order, the FCC has issued only one published decision – and no forfeiture orders, or even a notice of apparent liability – involving violations of the telephone solicitation rules. See Consumer.Net *v. AT&T Corp.*, 15 FCC Rcd 281 (1999). And in that lone decided case, the Commission found only two calls initiating telephone solicitations in violation of a prior do-not-call request, and a single failure to provide a do-not-call policy upon demand. Id. at 288-89, 295-99. While the Consumer.Net decision does not show a significant problem that would support adoption of new rules, it does provide perspective on the exaggerated reaction to telemarketing that has prompted some to

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431 Executive Order, Proper Consideration *of* Small Entities in Agency Rulemaking, August 13, 2002 (stating that "[a]gencies shall thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [Regulatory Flexibility Act]."). Such considerations also are required by the TCPA. If the FCC adopts a national do-not-call list, it must "consider the different needs of telemarketers conducting business on a national, regional, State, or local level." 47 U.S.C. § 227(c)(4)(A). In addition, the RFA directs agencies to provide "a description of and, where feasible, an estimate of the number of small entities to which [a] proposed rule will apply." 5 U.S.C. § 603(b)(3).

demand further regulation, as the complainants in the case demanded fines of *$100 million* for what amounted to two "offending" telephone solicitation calls. 44/

Rather than pointing to a record of enforcement difficulties, the Commission states that the current NPRM "is prompted, in part, by the increasing number and variety of inquiries and complaints about telemarketing." NPRM ¶ 8. However, the fact that the Commission has received inquiries and complaints about "telemarketing practices" is far from sufficient to support adoption of a national "do-not-call" list or other new FCC rules. Even when taken at face value, the Commission's tally of complaints, inquiries and website visits fails to demonstrate a significant problem. Given the FCC's assumption regarding the total number of telemarketing calls made each year, the statistics put forward in the NPRM reveal that only .0002 percent of the calls result in complaints. But even this figure is grossly inflated, since about two-thirds of TCPA complaints do not arise from allegations of noncompliance with company-specific "do-not-call'' requirements, and the existence of a complaint does not amount to a violation of the rules. See infra Section II.B. 3.

As a threshold matter, the Commission's observations about website visits, inquiries and complaints say nothing about the effectiveness of the current rules. Website hits alone provide no indication of concern over telemarketing in general or about particular telemarketing practices. Those who visited the FCC's website simply may have been curious about the issue, or gotten the information they needed to

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44/ Compared to multiple notices of apparent liability and forfeiture orders accounting for nearly $7 million in collected and proposed fines for junk fax violations, see NPRM ¶ 7 n.40, the paucity of Commission action on telephone solicitation violations is significant.

resolve any problems they may have had, or might have been counsel and parties participating in ongoing rulemaking proceedings. There is nothing to suggest that the number of website visits translates into a significant number of "complaints." 45/

Similarly, the Commission's observation that over 11,000 TCPA complaints have been filed in the past two years is not evidence that any rules have been violated. The Commission recognizes, and regularly recites in its public releases, that complaints cannot be equated with rule violations. In the Consumer and Governmental Affairs Bureau's quarterly report on informal complaints and inquiries released less than a month after the NPRM, the Commission noted it "receives many complaints that do not involve violations of the [Act] or a FCC rule or order," and it stressed that "*a* complaint does not necessarily indicate wrongdoing." Report on Informal Consumer Inquiries and Complaints, 2nd Quarter Calendar Year 2002 (CGB Oct. 15, 2002) (emphasis added). Nor do inquiries amount to complaints. During the most recent quarter for which data are available, only one in six consumers who contacted the FCC with regard to telemarketing did so to lodge a complaint about it. 46/

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451 Indeed, the Commission reports that its fact sheet on "Unwanted Telephone Marketing Calls" sheet received over 162,000 hits in February 2002, NPRM ¶ 8, which translates into hundreds of thousands of hits this year, yet the Commission received only 11,000 telemarketing complaints in twice that time. Id. This means that far less than **1** percent of those who visited the FCC website with an interest in "unwanted telephone marketing calls" did so in order to complain about telemarketing practices. In the process of preparing these comments, counsel for ATA has visited the Commission's website dozens of times, as many others undoubtedly have done, to gather information. It is untenable for the Commission to assume that website "hits" are related to complaints.

46/ Id. (reporting 6,994 TCPA inquiries but only 1,385 complaints for 2nd quarter 2002). In any event, the Commission's own data does not show any upswing in tele-marketing complaints – the total number of complaints in the last two years averages

In addition, based on the limited information made available in the NPRM, the data indicate that over a third of the complaints have nothing at all to do with telephone solicitations but rather involve the transmission of "junk faxes." 47/

All told, the number of TCPA complaints does not seem to have created a pressing need for Commission rulemaking. It also is worth noting that, when the FCC commenced a rulemaking earlier this year to reform its informal complaint process, the number of telemarketing complaints went unmentioned. See Establishment of Rules Governing Procedures to be Followed When Informal Complaints are Filed by Consumers Against Entities Regulated by the Commission, 17 FCC Rcd 3919 (2002) ("Informal Complaints *NPRM*"). In that docket, the Commission set out to "establish a unified, streamlined process for . . . informal complaints filed by consumers in order to promote maximum compliance with the . . . Act." Id. at 3919, ¶ 1. Yet, in seeking to maximize consumer ability to seek redress before the FCC for violations of the Act, the Commission said nothing about any "increasing number and variety of inquiries and complaints involving . . . telemarketing and unsolicited fax advertisements." NPRM ¶ 8.

Even if the complaints and inquiries the NPRM cites could be seen as marginally instructive on the issue of consumer concern over telemarketing, nothing in

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458 complaints a month, a figure almost identical to the monthly average of 461 complaints found in the Report on Informal Consumer Inquiries and Complaints for the most recent quarter.

47/ Specifically, the NPRM reports "11,000 complaints about telemarketing" for the two year period 2000-2001, see NPRM ¶ 8 & n.44, and "over 2,100 complaints about unsolicited advertisements sent to fax machines" in 2001 alone. Id. ¶ 8. Assuming the number of fax complaints remained constant over the two-year period, the total number of junk fax complaints was a full 38.18 percent of the total.

the Commission's experience suggests that supplanting or augmenting its company-specific do-not-call rules with a national do-not-call list is an appropriate response. The Commission's own data reveals that do-not-call complaints make up only one of five different categories of TCPA complaints. 48/ As noted, fax complaints alone account for nearly 40 percent of TCPA-related complaints, see supra note 47, which leaves four distinct categories by which the remaining complaints are divided.

The data the Commission has amassed thus far show only that some telephone subscribers – who are by far in the minority of those who receive telemarketing calls – have some kind of concern about telemarketing practices. The Commission's tally of inquiries and complaints, however, says nothing about the substance of those concerns. There is no way to tell how much of the concern arises from failure by companies to honor their respective do-not-call lists under the existing rules. Nor is there any way to tell – with no more to go on than raw numbers of complaints, inquiries and website visits, and a single FCC decision finding a couple of improper telephone solicitations placed in error – how well-informed the public is about their existing rights. The fact that the "Unwanted Telephone Marketing Calls" fact sheet on the Commission's website can boast over 162,000 hits in February 2002 alone suggests that they may be as informed as they want to be. Nonetheless, in considering the adoption of a national do-not-call list, the Commission notes that "the effectiveness

48/ The most recent Report on Informal Consumer Inquiries and Complaints explains that the 1385 TCPA complaints the FCC received during second quarter 2002 fell into one of five categories: Artificial or Prerecorded Message and/or ATDS, Do Not Call List Not Honored, Fax Complaint, TCPA General Solicitations, and Time of Day Violation.

and value of any [such list is] contingent upon an informed public." NPRM ¶ 54. The same holds true of the existing company-specific rules.

Hence, the Commission cannot evaluate whether the existing rules have been effective unless and until it develops a record on how well-informed the public is about their existing rights. So far, the Commission has little information about the extent to which telephone subscribers are availing themselves of available remedies – and perhaps even less data about the level of public interest in doing so. As the Supreme Court has held, when public reaction to such potential remedies is a "collective yawn," the government must act to overcome that "tepid response" to existing measures before proposing new, more onerous rules. *See U.S.* v. *Playboy Entertainment Group,* 529 U.S. 803, 816 (2000). Thus, the FCC must not only determine whether the "do-not-call" provisions of the existing rules are being violated, but also why this is so. If the company-specific rules are insufficiently effective due to a lack of public awareness or because enforcement is inadequate, the Commission must address these deficiencies first before seeking to impose greater restrictions.

One final point is worth noting. This proceeding undoubtedly will generate much public comment, but it would be a serious mistake for the Commission simply to tally the number of comments filed as a measure of concern or of public support for a national "do-not-call" database. Not only must the comments be considered on their individual merits (*e.g.*, the data provided, arguments made, legal reasoning, etc.), but mass "form" comments submitted as a result of orchestrated campaigns should be discounted. For example, Indiana Attorney General Stephen

Carter sent a spam email to 148,000 Indiana residents who registered with that state's no-call registry and urged them to oppose federal preemption of state laws. The unsolicited email, which contained an electronic link to the FCC's comment page, asserted misleadingly that "[s]hould the FCC try to pre-empt state law, you could receive unwanted calls from some companies that you have previously done business with . . . credit card companies, phone companies, and anybody else that considers you an 'existing customer.'" 49/ As a result of this campaign, thousands of brief, non-substantive comments poured into the Commission, but they can hardly be accorded any weight or considered as support for a national "do-not-call" list. 50/

2. The Commission Must Make TCPA Complaints Generally Available to Commenters in This Proceeding

Although ATA believes that the TCPA complaints do not indicate a need to revise the current rules, the Commission's reliance on them in issuing its NPRM makes it imperative that the agency release the complaints for independent review and analysis. See NPRM ¶ 8. As a general matter, access to the documents is necessary to ensure "that interested parties have a meaningful opportunity to participate . . . and that the Court has an adequate record from which to determine whether the agency properly performed its functions." ***Abbott*** Laboratories v. *Young,* 691 F. Supp. 462, 467

49/ See Exhibit 9 (copy of email from Stephen Carter). Needless to say, using a state's no-call list as a database for sending political spam is ironic, to say the least.

50/ The number of comments on file in this proceeding was nearing 250 on November 14, but jumped to over 5,000 within a week after the Attorney General's unsolicited message. In the space of a single hour on November 19, the number of comments surged from 2,100 to 3,300.

(D.D.C. 1988), remanded on other grounds, 920 F.2d 984 (D.C. Cir. 1990), *cert.* denied sub. nom., Abbott Laboratories *v.* Kessler, 502 U.S. 819 (1991). The Commission has noted that a decision "to withhold information in the context of a rulemaking can have a significant impact on whether commenters have had meaningful notice and opportunity to comment on the bases of an agency's decision." 51/

One purpose of the requirement that agencies disclose the documents it deems relevant to a proceeding "is to ensure that interested parties have a full opportunity to participate in the proceeding by providing a different perspective on materials that may be relied upon by the agency." Id. The Commission recently applied this principle in its broadcast ownership proceeding, making its internal data available to commenters. 52/ In doing *so,* it acknowledged that by placing documents over which it has complete control at issue in a rulemaking proceeding, it is obligated to provide sufficient time for the parties to analyze the information before filing comments.

The same principle applies here, and **ATA** believes that the informal complaints should be routinely available. See, *e.g.*, 47 C.F.R. § 0.453. However, ATA was advised by Commission staff that it would be necessary to file a Freedom of Information Act request in order gain access to the complaints. ATA did *so,* and has been informed that it would take several months to produce the documents and that

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51/ Examination *of* Current Policy Concerning the Treatment *of* Confidential Information Submitted to the *Commission*, Report and Order, 13 FCC Rcd 24816, 24844 (1998).

52/ See FCC's Media Bureau Adopts Procedures for Public Access to Data *Underlying* Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review Of Commission's Media Ownership Rules, **MB** Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, Public Notice, DA 02-2980 (Nov. 5, 2002).

ATA would be charged approximately $25,000 for "search and review costs" and copying charges. Letter of K. Dane Snowden, Chief, Consumer and Governmental Affairs Bureau, Federal Communications Commission, to Ronnie London, Counsel for ATA, filed in Control No. 2003-023 (Nov. 29, 2002), attached hereto as Exhibit 10.

ATA believes it is unconscionable for the Commission to initiate a rulemaking proceeding based, in part, on certain documents under its control and to make them available – if at all – months after the comment period has closed. It is equally invalid to charge cornmenters an exorbitant fee in order to obtain the documents. Accordingly, ATA has filed an administrative appeal of the FCC's FOIA response. The Commission cannot legitimately bring the comment period to a close until it makes these documents generally available to all commenters. This is especially true here, since preliminary analysis of the complaints released thus far shows that two-thirds of them have nothing to do with "do-not-call'' issues. See *infra* note 93 and accompanying text.

3. Company-Specific Do-Not-Call Lists Are Effective

Rather that seeking to decipher the meaning of unresolved TCPA complaints, the Commission should focus on the widespread compliance with, and the effectiveness of, its company-specific "do-not-call'' list requirement. In doing so, it would discover that the glass is 99.9 percent full, and not .1 percent empty. The high rate of compliance stems from the fact that many companies voluntarily maintained such lists even before the FCC's rules went into effect. See *TCPA* Report & Order, 7 FCC Rcd at 8765. See ***also*** McGarry Aff. ¶ 5. This is explained in large part by the

natural incentive to not alienate telephone subscribers. Both prior to and since the FCC and FTC "do-not-call" rules went into effect, company-specific lists have been effective in balancing the respective interests of telephone subscribers who wish not to be called, consumers who welcome the opportunity to make telephonic purchases, and businesses seeking to market their goods and services over the telephone.

Teleservices providers take their obligation to honor company-specific do-not-call requests very seriously, and are exceedingly diligent in maintaining the lists and necessary procedures to give effect to consumer desires in this area. See, *e.g.*, Affidavit of Nancy Korzeniewski, ¶ 4, attached hereto as Exhibit 11 ("Korzeniewski Aff.") ("InfoCision already employs one manager and three staff assistants . . . dedicated to compliance issues"). As noted, ATA built into its Code of Ethics a guideline that its members provide adequate training in professional telemarketing, recognized procedures and proper etiquette. See Exhibit 1. This is intended to include, of course, training in taking and honoring do-not-call requests. Companies typically train their personnel to strictly adhere to all applicable telemarketing laws and regulations, including "do-not-call" procedures. McGarry Aff. ¶ 5, Ex. 7.

The industry's efforts to maintain reliable company-specific "do-not-call" lists, and to abide by them, include the establishment of written procedures, developing and updating the lists, investing in additional phone lines to accommodate "do-not-call" requests, purchasing and using special software to scrub marketing lists against do-not-call lists, and responding to consumer requests for written copies of "do-not-call" policies. See Mattingly Aff. ¶ 13, Ex. 6. For example, InfoCision has spent over

$25,000 during the past year alone obtaining do-not-call lists, which it electronically scrubs against all of its own lists as part of a burdensome process that requires the "do-not-call" lists to be converted into a form readable by InfoCision's proprietary predictive dialing application. Korzeniewski Aff. ¶ **4,** Ex. 11. InfoCision also scrubs all of its lists against its own company-specific do-not-call list, which contains 250,000 names, as well as those of its clients. *Id.* Though such efforts are time-consuming and costly, ATA's members accept that it is not productive to call consumers who do not wish to be contacted, and they recognize that honoring "do-not-call'' requests is a necessary cost of business. See Mattingly Aff. ¶ 11, Ex. 6.

The magnitude of the industry's effort to satisfy company-specific "do-not-call" requirements is impressive. Some ATA members that operate on a nationwide basis maintain in-house do-not-call lists that include tens of millions of names. *Id.* ¶¶ 7-*8.* Even relatively small entities that rely on teleservices, such as Personal Legal Plans' 225-person operation, can have over a hundred thousand names on their company-specific "do-not-call list." McGarry Aff. ¶¶ 4-5, Ex. 7. The lists are updated frequently, sometimes as often as every twenty-four hours. *Id.* See *also* Korzeniewski Aff. ¶ 4, Ex. 11 (InfoCision lists updated daily). Even very small entities, that make relatively few calls and have only a handful of names on their "do-not-call" lists, scrupulously honor consumers' "do-not-call'' requests. See Mattingly Aff. ¶ 6, Ex. 6. One ATA member maintains a "do-not-call" list with only 31 names. *Id.* ¶ 9. These extreme variations illustrate the effectiveness of the TCPA company-specific approach, in contrast to a nationwide. one-size-fits-all rule.

A recently conducted ATA survey noted above confirms that company-specific lists are effective from the telephone subscriber's perspective, as well. See Marketing Survey of Consumer Attitudes Regarding Telemarketing, attached hereto as Exhibit 12 ("ATA Survey"). In a sample of 1,000 U.S. residents conducted in November 2002, about one-third of the respondents (34.4 percent) indicated that they had asked to have their names placed on a telemarketer's "do-not-call'' list during the previous year. See id. Of those respondents, almost 63 percent (62.9%) reported that calls stopped when the placed their names on a particular company's "do-not-call'' list, while another 9.5 percent said that they did not know whether they had gotten any subsequent calls. These results, which show that nearly three-quarters of respondents found company-specific lists to be effective (or, at least, for the 9.5 percent "don't knows" not to be ineffective), even underestimate the extent to which the federal rules are working. 53/

In rare cases where "do-not-call'' violations occur, they are almost always committed unintentionally and are the exception rather than the rule. 54/ In some

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53/ For the 27.7 percent of respondents who said they had gotten subsequent calls, it is likely that this represents significant over-reporting and not actual violations of the rule. At the FTC's June 2002 Telemarketing Sales Rule Forum, Rex Burlison, Chief Counsel with the Missouri Attorney General's Office, stated that over forty percent of the 19,000 complaints Missouri received during one year of enforcing its do-not-call program did not produce enforcement actions. See FTC, Transcript *of* Amendment to the Telemarketing Sales Rule Forum held on June 5, 2002, p. 206, at http://www.ftc.gov/bcp/rulemaking/tsr/020605xscript.pdf. Mr. Burlison stated that about 4,000 of the complaints involved exempt organizations, while about another 4,000 were unenforceable "for some reason or another," including irregularities in the registration process and insufficient data. Id. at pp. 205-06.

54/ The Commission should recognize that, in exceptional cases of intentional disregard of "do-not-call'' requests, it would make little difference whether the violation

cases the "violation" involves no more than a repeat call between the time that a "do-not-call" request is made and the time a telemarketer updates its list. 55/ In other cases, multiple individuals share a telephone number, and a telemarketer may reach a person on its "do-not-call'' list in an effort to speak with another member of the household. See Bottom Aff. ¶ 6, Ex. *8.* Even aside from these non-violation "violations," perfect compliance is impossible to attain as a practical matter. The TCPA recognizes as much by imposing liability for violations of the Commission's TCPA rules only if a telemarketer makes more than one offending call to an individual in a twelve-month period. See 47 U.S.C. § 227(c)(5). All told, teleservices providers go to great lengths to honor consumers' company-specific "do-not-call request," and ATA has discovered their efforts have met with great success.

C. State Laws Have Significantly Increased the Regulatory Burdens Faced by Telemarketers

Since TCPAs enactment and the adoption of federal rules, there has been a significant proliferation of state laws regulating telemarketing. As the NPRM notes, over half the states have adopted "do-not-call'' laws. *Id.* ¶¶ 9, 60. A number of

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arises out of a failure to honor a consumer's request to be placed on a company-specific "do-not-call'' list, or his or her enrollment on a national "do-not-call'' database. The only real solution for such abuses is enforcing the rule that is in place, not a change in the regulations that intentional violators have no intention of following.

55/ Among the small sample of complaints provided to ATA in response to its FOIA request, see Exhibit 10, was a claim by one subscriber that a long distance carrier "called me 3 times **1** time each day trying to get me to switch." The carrier's explanation, which was also provided as part of the FOIA response, stated that it respected the complaining subscriber's request by marking his or her phone number in the carrier's database as "do not call," but that "process requires approximately 30 to 60 days" to take effect.

others have adopted restrictions that, while stopping short of "do-not-call'' lists, directly regulate telemarketing. The net result is that telemarketers must labor to ensure they comply with a labyrinth of divergent statutory and regulatory schemes.

Though federal law prohibits callers from contacting subscribers who have indicated they do not wish to be contacted, *see* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(e), and it prohibits abusive telemarketing practices, *see* 15 U.S.C. § 6102(c), many states have imposed further restrictions. These state laws have wildly varying requirements (and exemptions) that telemarketers must track and observe. 56/ Moreover, while some states limit the application of their telemarketing rules to intrastate calls, most demonstrate an unwillingness to restrict application of their telemarketing laws to such calls. *See* NPRM ¶ 64 ("state Attorneys General argue that the states have the authority to enforce their own no-call laws against telemarketers across the country"). 57/ As a result, telemarketers who must comply with such state laws are increasingly subject to a patchwork of disparate prohibitions and obligations. *See generally* Exhibit 13.

Among states that take similar approaches, telemarketing laws can vary sufficiently to impose significant administrative burdens on telemarketers. Even the number of states that regulate telemarketing can be difficult to track. While the Commission counts 21 that have do-not-call databases in effect or are implementing a

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56/ A chart outlining the various state law requirements is attached as Exhibit 13.

57/ ATA believes that the states' assertion of jurisdiction over interstate calls is illegitimate and should be preempted. *See infra* Section IV.D.

database system, see NPRM ¶ 9 n.48, at present more than half the states regulate telemarketing. 58/

The differences among these state laws present compliance challenges for telemarketers. For example, the Alabama Telemarketing Act, which relies on a do-not-call database, see Ala. Code § 8-19C-2, exempts calls by educational entities, as well as calls by, inter alia, securities, commodities or investment brokers; newspapers, magazines and periodicals; book, video and record clubs; financial institutions and insurance agents; and telephone and cable television companies. See id. §§ 8-19A-3;(15), (17), (19) & 8-19A-4. Exemptions in Wyoming include calls in connection with executory contracts and outstanding debts, and calls made by entities that make fewer than 225 unsolicited calls per year. Wyo. Stat. Ann. § 40-12-301(a)(xi). Florida's statute contains no such de minimis provision, but includes the exemption for outstanding debts and executory contracts, and for newspapers (but not other periodicals) as well. Fla. Stat. Ann. § 501.059(1)(c). All told, for virtually every state with a "do-not-call'' list, there is a unique set of rules and exemptions that apply. 59/ For a company that operates nationally, simply obtaining the respective state "do-not-call'' lists costs more than $25,000 annually. 60/

58/ See, *e.g.*, A Telemarketing Update, National Conference of State Legislatures, News from the States (Winter 2002), available at http://www.ncsl.org/programs/lis/CIP/CIPCOMM/news0202.htm. See also infra Section IV.D (quoting Operator Services Providers of America Petition for *Expedited* Declaratory Ruling, 6 FCC Rcd 4475, 4476-77 (1991) ("plenary and comprehensive jurisdiction over interstate and foreign communications . . . is entrusted" to the FCC, whose "jurisdiction over interstate and foreign communications is exclusive of state authority").

59/ See Exhibit 13. Even where states allow for similar exemptions, the criteria for the exemption may vary. For example, most states exempt calls from businesses with

State laws that rely on measures other than "do-not-call" lists to regulate telemarketing add further complexity to the mix. While some simply prohibit specified types of telephone solicitations and practices, see *e.g.,* Ohio Rev. Code Ann. § 4719.01 et seq., others follow the federal model, whereby subscribers can request, on a telemarketer-by-telemarketer basis, that no further telephone solicitations be made. *E.g.,* Haw. Rev. Stat. § 481P-3(7)(A); S.C. Code Ann. § 16-17-445(B)(5). As with the laws described above that rely on do-not-call lists, each of these state statutes utilize their own sets of exemptions and/or idiosyncrasies. Telemarketers must master this patchwork of state laws (as well as the existing federal overlay) or expose themselves to civil liability, or even criminal penalties in some states. 61/

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which the subscriber has a preexisting business relationship. But states vary on how long in the past the relationship may have existed. *Compare* C.R.S. § 6-1-903(7)(a)(III) (18 months); *with*, *e.g.*, Mo. Rev. Stat. § 407.1095(3)(b) (180 days); Tenn. Code Ann. § 65-4-401(6)(B)(iii) (12 months); Alaska Stat. § 45.50.475(g)(3)(B)(v) (24 months); Ark. Code Ann. § 4-9-403(5)(A) (36 months).

60/ See Korzeniewski Aff. ¶ 4, Ex. 11. See *also* Mattingley Aff. ¶ 11, Ex. 6. Some state requirements threaten to drive these costs even higher. Wisconsin, for example, purports to charge telemarketers $700 for an initial registration, $500 for annual registration thereafter, and an annual "supplementary fee" of $75 for each outgoing telephone line they use. See Exhibit 13 (chart of state laws). For a firm with a national presence, Wisconsin's fees alone could reach $100,000 annually for a telemarketer with *6,000* agents in 80 call centers.

61/ See, *e.g.*, Ariz. Rev. Stat. §§ 13-2919, 44-1277; Ark. Code Ann. § 5-63-204; Cal. Labor Code § 270.6; Ind. Code §§ 24-5-12-22, 24-5-12-25; Md. Code Ann., Publ. Utils., §§ 8-204, 8-205; Mich. Comp. Laws § 484.125; Nev. Rev. Stat. § 599B.255; Ohio Rev. Code Ann. §§ 4719.13, 4719.99; Okla. Stat. Ann. § 1861; R.I. Gen. Laws §§ 5-61-3.5, 5-61-3.6, 5-61-5; **S.D.** Codified Laws §§ 37-30-3, 37-30-5, 37-30-6, 37-30-25, 37-30-26, 37-30-27, 37-30-38, ; Tenn. Code Ann. § 47-18-1526; Tex. Occ. Code Ann. § 9023e; Utah Code Ann. § 13-25a-105; Wash. Rev. Code § 19.158.150; Wyo. Stat. Ann. § 6-6-104.

In order to meet these compliance burdens, telemarketers must master and comply with the registration and bonding requirements in each individual state. They must also purchase each state's "do-not-call'' list or similar database, then obtain software to process the list or employ an outside contractor to do so. Such processing requires that every database purchased from a list seller, as well as every list a company compiles itself, must be "scrubbed to delete all telephone numbers that appear on state lists or that are enrolled in the Telephone Preference Service ("TPS") offered by the Direct Marketing Association ("DMA"). 62/ ATA conducts seminars throughout the country, on a near-monthly basis, to help its members keep up with and ensure compliance with the myriad state laws and the federal rules. These day-long compliance seminars focus on the most important regulatory issues facing teleservices providers and allow members to ask questions of ATA legal counsel and seek input on compliance questions. **See** Exhibit *2.*

At the end of the day, the prospect of the Commission adopting layers of new regulations on top of the melange of existing FCC rules, proposed FTC rules (discussed further below), and disparate state laws makes little sense. Even the states are unsure how overlapping federal and state rules might be reconciled. For example, one state commission urges the FCC to preserve state rights to enforce state no-call-list violations, but it offers no suggestions on how the FCC should do so. **See** Texas PUC Comments at 5-6. In fact, in view of the potential for overlapping and conflicting federal and state laws, the Texas PUC advocates the creation of yet another level of

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62/ Naturally, these expenses must be passed along as costs of doing business, and they therefore contribute to the overall consumer cost of a product or service.

bureaucracy – an FCC/FTC/state "working group" – that would "work cooperatively" to somehow reconcile the various government telemarketing regulatory efforts. *Id. Cf.* Colorado PUC Comments at 5 (asking how "a determination [will] be made as to whether a violation requires state or federal action," whether "different standards [could] be created for different states because each state may have its own unique consumer protection laws," and how "enforcement [will] be funded)

Telemarketers already dedicate significant efforts and incur considerable expense, both directly and in a loss of cost-effectiveness, complying with existing law. 63/ If the Commission takes any action in response to the NPRM, it should be to clarify that the states lack any jurisdiction over interstate calls and to reconcile the FCC's rules with the various state laws, as discussed in Section IV.D below

D. The FTC's Rulemaking Effort Does Not Support the Adoption of New FCC Rules

The fact that the FTC has commenced a rulemaking under the Telemarketing Consumer Fraud and Abuse Prevention Act ("Telemarketing Act"), 15 U.S.C. §§ 6101-6108, has little bearing on the questions confronting the Commission in this proceeding. The Telemarketing Act was enacted to regulate certain specified telemarketing practices to protect consumers from telemarketing deception and abuse. *Id.* § 6101(3)-(5). Accordingly, Congress authorized the FTC to "prescribe rules

63/ See Exhibits 6, 7, 11 (Mattingley, McGarry and Korzeniewski affidavits).

prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices." 15 U.S.C. § 6102(a)(1). 64/

Pursuant to the Telemarketing Act, the FTC adopted the Telemarketing Sales Rule ("TSR), which went into effect on December 31, 1995. 16 C.F.R. § 310.4. The TSR implemented disclosure requirements for telemarketers, *id.* § 310.4(d), prohibited the misrepresentation of the goods or services or the terms and conditions of the offer, *id.* § 310.3 (a)(2), and prescribed rules for payments obtained over the phone. *Id.* §§ 310.3 (a)(3) & 310.4(a)(2)-(4). It also imposed time-of-day restrictions on telemarketing calls, *id.* § 310.4(c), and required the use of company-specific no-call lists. *Id.* § 310.4(b)(I)(ii). Now, seven years later, the FTC is considering revising the TSR to include, among other things, a national "do-not-call'' list. *See Telemarketing Sales Rule,* Notice of Proposed Rulemaking, 67 Fed. Reg. 4492 (January 30, 2002) ("FTC NPRM). Although the FTC's intention to amend the TSR appears motivated by a desire to address "consumer privacy," *id.* at 9, the actual purpose for which the FTC was given its rulemaking authority – to combat fraudulent and abusive trade practices –

64/ Sections 6102(a)(1)-(3) give the FTC authority to: (1) "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices;" (2) define "deceptive telemarketing acts or practices . . . which may include acts or practices of entities or individuals that assist or facilitate deceptive telemarketing, including credit card laundering;" (3) "require[ ] that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer's right to privacy;" (4) "restrict[] . . . the hours of the day and night when unsolicited telephone calls can be made to consumers;" and (5) "require[ ] . . . person[s] engaged in telemarketing . . . [to] promptly and clearly disclose to the person receiving the call that the purpose of the call is to sell goods or services [or in the case of charitable organizations, that the purpose is to solicit charitable contributions] and make such other disclosures as the Commission deems appropriate."

has already been met. *See* FTC NPRM at 6 (noting that "commenters uniformly praised the effectiveness of the TSR in combating . . . fraudulent practices").

Accordingly, there is no foundation for the FTC's proposed rule. The Telemarketing Act, which gave the FTC authority to regulate telephone sales, did not authorize it to make broad-sweeping protections of consumer privacy. Instead, FTC authority is limited to targeting telemarketing practices that are fraudulent or abusive. This limited authority to regulate consumer fraud does not empower the agency to regulate consumer privacy issues or adopt a national "do-not-call'' list. *See FDA v. Brown & Williamson Tobacco Co.,* 529 U.S. 120, 161 (2000) ("an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress"). *See also Motion Picture Ass'n of America v. FCC,* 309 F.3d 796, 806 (D.C. Cir. 2002) (agency "cannot act in the 'public interest' if [it] does not otherwise have the authority to promulgate the regulations at issue"). The extent to which it is endeavoring to do so is certainly no basis for the FCC to take action similar to that being considered – impermissibly – by the FTC.

Even if the FTC had the authority to consider adopting a "do-not-call'' list, it has not substantiated the nature and extent of the problem its proposed action claims to address. The FTC has not investigated beyond the face of the complaints it has received to ascertain whether the complaints include legitimate grievances. Based on what is likely a small percentage of no-call complaints, and a failure by the FTC to even attempt to substantiate the problem or need for rules to address it, the FTC has not

provided sufficient support to adopt a national "do-not-call" list even if its enabling statute had authorized it to enact such a rule. 65/

The only appropriate and meaningful lesson to be learned from the FTC's efforts is that FCC action is unnecessary to protect against fraud perpetrated by the few irresponsible and unscrupulous telemarketers who make up a very small minority of the teleservices industry. As noted, the FTC's existing TSR already affords consumers specific and effective protections against telemarketing fraud. 66/ In a press release announcing the results of more than five years of enforcement of the rule, the FTC claimed that it (or the U.S. Department of Justice acting on its behalf) had already brought 121 law enforcement actions alleging rule violations. 67/ At the time of the FTC's press release, three-quarters of those actions had resulted "in injunctions against misrepresentations and future violations of the Rule, outright bans against some or all forms of telemarketing in some cases, and monetary judgments totaling more than $152 million in consumer redress and $500,000 in civil penalties." Id.

65/ As a result of the above-described inadequacies with the bases of and authority for the FTC's action, the FCC's characterization of the reasons for the FTC action as "an increase in consumer demand for greater privacy," NPRM ¶ 10, is inaccurate and the FCC cannot rely on the FTC complaints (much as it cannot rely on the TCPA complaints as discussed in Section II.B of these comments) to support the FCC's rulemaking.

66/ See supra Section II.D. See also Telemarketing and Competition Study at 5 ("Since abusive and deceptive sales practices are already illegal, 'do not call' initiatives presumably reflect consumer annoyance with unwanted calls rather than an effort to prevent unlawful behavior.").

67/ Press Release, Federal Trade Commission, FTC Telemarketing Sales Rule Marks Fifth Anniversary; Total *of* More than $152 Million in Consumer Redress Ordered, Mar. 26, 2001.

Furthermore, the FTC also noted that the states had brought "many Rule enforcement actions during the last five years, both on their own and with the FTC as co-plaintiff." *Id.* There is thus already an effective framework in place for preventing actual abuse when necessary

E. Marketplace Solutions Have Evolved to Empower Consumer Choice With Respect to Telemarketing

The technological landscape that supported the Commission's adoption of its existing "do-not-call'' rule has changed in a manner that diminishes, rather than increases, the need for government intervention to assist consumers in responding to telemarketing. As noted in the discussion of the legislative history, the TCPA was based on the understanding that consumers were unable to protect themselves against unwelcome or abusive teleservices practices. Indeed, in adopting the TCPA, Congress specifically found that no technical solutions existed to permit homeowners to control telephone calls coming into their homes. Pub. L. No. 102-243, § 2(11). However, the situation has changed radically in the last decade, as today's consumers have numerous alternatives they can use to guard against unwanted telephone solicitations.

Several market-based solutions have evolved since the TCPA went into effect that enable consumers to decide what sorts of telecommunications reach their home, including services offered by phone service providers *(i.e.* Caller ID, Call Rejection, and No Solicitation Services), 68/ and numerous consumer electronics devices. 69/ For example, "No Solicitation Service" offers consumers the ability to

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68/ See Exhibit **14:** Telecommunication Services to Control Telecommunications.

69/ See Exhibit 15: Consumer Electronic Devices to Control Telemarketing.

greet incoming callers with a pre-recorded announcement asking solicitors to please hang up and remove the consumer's name from their call list (it also includes a mechanism that allows friends and relatives to bypass the announcement). Similarly, the shareware program called "Talking Caller ID" identifies a caller and passes the information along to the consumer before the phone is even answered, and when the program identifies a telemarketer, it sends a message to the telemarketer's computer, instructing it to remove the caller's telephone number from its call list. The "Tele-Zapper," which connects directly to a consumer's telephone, emits a special tone when the phone is answered to "fool" telemarketing dialing devices dialers into detecting a disconnected number. such that the call disconnects and the consumer's number is logged into the telemarketer's database as disconnected. These solutions are affordable, 70/ easy to implement, and allow consumers greater freedom to select the types of teleservices calls, if any, they wish to receive. Importantly, it makes the decision about whether to receive telemarketing calls – and which ones to let through – a matter of consumer choice rather than government fiat.

The teleservices industry has also voluntarily implemented solutions to allow consumers to curb telemarketing solicitations in the home. For example, the **DMA** offers TPS, which allows consumers to place their name on a "do-not-call'' list. The DMA's list, because it is a voluntary solution imposed by those in the teleservices industry, allows consumers to block all types of telephone solicitations the consumer

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70/ For example, fees for such phone services in Colorado range from $4.50 to $9.95 per month plus a one-time installation fee of $8.50. Consumer electronic devices designed to discourage or block telemarketing calls to a residence range from a one-time cost of $12.99 to $119.95. See Exhibits 14-15.

considers unwelcome, including telephone calls from not-for-profit organizations and political organizations and candidates. 71/ In contrast, the national no-call list proposed by the FCC, like those already implemented by several states, contains exceptions for political and religious groups.

Together, the above services offered by telephone companies, consumer electronics devices, and self-imposed regulation by the teleservices industry adequately supplement the existing FCC and FTC rules governing telemarketing. The combination of regulatory and market-based solutions is consistent with the TCPAs command that the FCC rely on "alternative methods" made available by both "public and private entities" in any TCPA rulemaking proceeding. See 47 U.S.C. §§ 227(c)(1)(A)-(B). Currently, every telephone subscriber has a range of available alternatives with which he or she can exert control over incoming calls and that were not generally available a decade ago. Therefore, any changes to the FCC's rules to adopt a national "do-not-call'' database would be superfluous and unnecessary.

III. A NATIONAL "DO-NOT-CALL" LIST WOULD VIOLATE THE FIRST AMENDMENT

The FCC correctly recognizes the importance of constitutional analysis in this proceeding. See NPRM ¶¶ 12, 50. However, the Notice presumes incorrectly that the intermediate First Amendment test for commercial speech should be applied to any new regulations, and accordingly seeks comment only on "whether a national do-not-call list satisfies each of the standards articulated in Central *Hudson,* including the

71/ FTC Telemarketing Sales Rule-Do Not Call Forum, Matter #P994414 held Tuesday, January 11,2000 Robert Sherman DMA, p. 98.